

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Application of)	
)	
EDNA CORNAGGIA)	File No. 8950059
)	
For a Conditional License for a New Broadband)	
Radio Service Station on the E Group Channels at)	
Gary, Indiana/Chicago, Illinois)	
)	

ORDER ON FURTHER RECONSIDERATION

Adopted: February 4, 2005**Released: February 4, 2005**

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. In this *Order on Further Reconsideration*, we consider a petition for reconsideration filed on October 27, 2003 by Alda Wireless Holdings, Inc. (Alda) and PCTV Gold, Inc. (PCTV) (hereinafter Petitioners).¹ Petitioners seek reconsideration of an *Order on Reconsideration* issued by the former Public Safety and Private Wireless Division (PS&PWD), Wireless Telecommunications Bureau reinstating the captioned application of Edna Cornaggia (Cornaggia) filed in January 1989 for a new Broadband Radio Service² (BRS) station in Gary, Indiana/Chicago, Illinois.³ For the reasons set forth below, we grant the Petition and order the dismissal of Cornaggia's application.

II. BACKGROUND

2. On September 9, 1983, Cornaggia filed an application for a new MMDS Station on the E Group channels at Chicago, Illinois.⁴ According to the Commission's licensing records, the application

¹ Petition for Reconsideration (filed on Oct. 27, 2003) (Petition).

² On July 29, 2004, the Commission released a *Report and Order and Further Notice of Proposed Rulemaking* that transforms the rules governing MDS and the Instructional Television Fixed Service (ITFS) in order to encourage the deployment of broadband services by commercial and educational entities. Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *et al.*; WT Docket Nos. 03-66, *et al.*, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 14165 (2004). To better reflect the forward-looking vision for these services, the Commission renamed MDS the Broadband Radio Service and ITFS the Educational Broadband Service. Because the new rules have taken effect, we will refer to the service by its new name.

³ See Edna Cornaggia, *Order on Reconsideration*, 18 FCC Rcd 19281 (WTB PSPWD 2003) (*Reconsideration Order*).

⁴ File No. 3528-CM-P-83.

was granted on December 11, 1987. Cornaggia's conditional license required her to construct the station within twelve months of the date of grant.⁵ On June 7, 1988, Cornaggia filed a modification application proposing a change of transmitter location.⁶ On November 14, 1988, the Domestic Facilities Division (Division) of the former Common Carrier Bureau dismissed the modification application because Cornaggia's proposed station was predicted to cause interference to another station.⁷ The Division also deemed Cornaggia's conditional license to be forfeited because the station was not constructed within the required period.⁸

3. Cornaggia filed a petition regarding the dismissal of her application. On January 5, 1989, she also filed a second modification application proposing to move her transmitter site location to a site in Gary, Indiana.⁹

4. On August 9, 1993, the Division issued the *Order on Reconsideration* denying Cornaggia's reconsideration petition.¹⁰ The *Order on Reconsideration* had the following discussion concerning the second modification application:

Cornaggia asks that, if her modification application is not reinstated in our consideration of her reconsideration petition, in the alternative, her modification application, as amended by the petition for reconsideration, be treated as newly-filed. However, it is no longer possible to amend an application which has already been dismissed, as Cornaggia's modification was dismissed. Therefore, we will not treat Cornaggia's modification application, File No. 50301-CM-MP-88, as newly-filed. We note that Cornaggia filed a second modification application, File 50059-CM-MP-89, after the forfeiture of her conditional license. However, it is no longer possible to modify an authorization which has been forfeited. Typically, modification applications filed after forfeiture are returned as unacceptable for filing or are dismissed. Because it was filed after forfeiture, in light of VisionAire's request for alternative treatment in its reconsideration petition, we will treat this second application as an initial application, and not as a modification application. The application file number will be changed from 50059-CM-MP-89 to 50059-CM-P-89.¹¹

5. Alda and PCTV are both wholly-owned subsidiaries of Sprint Corporation (Sprint).¹² On February 24, 1994, Arnold Malkan, who at that time was the licensee of BRS Station WHK999, Chicago,

⁵ Conditional License for Station WDU403.

⁶ File No. 50301-CM-MP-88.

⁷ See Edna Cornaggia, *Order on Reconsideration*, 8 FCC Rcd 5442 (CCB DFD 1993) at ¶ 2 (*CCB Reconsideration Order*).

⁸ *Id.*

⁹ File No. 50059-CM-MP-89.

¹⁰ *CCB Reconsideration Order*.

¹¹ *Id.*, 8 FCC Rcd at 5444 n.7.

¹² Petition at 1.

Illinois, filed a petition to deny directed against Cornaggia's application.¹³ The license for Station WHK999 was assigned to Alda in 2001.¹⁴

6. On March 11, 2002, staff of the former Video Services Division of the Mass Media Bureau dismissed Cornaggia's captioned application because its "independent engineering review indicates that the proposed facility fails to provide the interference protection required by the Commission's rules."¹⁵ The Dismissal Letter did not identify the station(s) that Cornaggia would interfere with or provide any information regarding the independent engineering review.¹⁶ Cornaggia filed a petition for reconsideration on April 9, 2002.¹⁷

7. In the *Reconsideration Order*, PS&PWD granted Cornaggia's Petition and reinstated her application. The Division agreed with Cornaggia that the *Dismissal Letter* did not identify the reasons why the application was defective or provide information concerning the staff's engineering analysis.¹⁸ Because the Dismissal Letter did not provide any information concerning the basis for the conclusion that Cornaggia's application did not comply with the interference rules, staff conducted another analysis of Cornaggia's proposal.¹⁹ Based upon that analysis, which was conducted in accordance with the rules in effect at the time Cornaggia's application was filed, and based upon the information available at that time, the Division concluded that Cornaggia's application appeared to be in compliance with the applicable interference rules.²⁰ It therefore reinstated Cornaggia's application.

III. DISCUSSION

8. Initially, Cornaggia argues that the Petition should be dismissed because Sprint did not seek continued prosecution of Malkan's petition to deny in 2002.²¹ We disagree. The *Dismissal Letter* granted the relief Malkan had sought by dismissing Cornaggia's application. Accordingly, Sprint had no reason to request continued processing of a petition to deny when the relief requested had already been granted.

9. Alda is the licensee of BRS Station WHK999, Chicago, Illinois and PCTV is the holder of the authorization of Basic Trading Area (BTA) B078, which encompasses the tower site applied for in Cornaggia's application. Petitioners argue that Cornaggia's application did not comply with the

¹³ Petition to Deny (filed Feb. 24, 1994).

¹⁴ Specifically, on January 29, 2001, the former Mass Media Bureau consented to the assignment of the license of Station WHK999 to Evans Microwave, Inc. File No. BALMD-2000817ACQ (granted Jan. 29, 2001). Subsequently, on September 14, 2001, the former Mass Media Bureau consented to the assignment of the license of Station WHK999 from Evans Microwave, Inc. to Alda. File No. BALMD-20010226AAA (granted Sep. 14, 2001).

¹⁵ Letter from Sharon M. Bertlesen, Supervisory Attorney, MDS Section, Video Services Division, Mass Media Bureau to Edna Cornaggia (dated Mar. 11, 2002) (*Dismissal Letter*).

¹⁶ *Id.*

¹⁷ Cornaggia filed an opposition on November 24, 2003. Opposition to Petition for Reconsideration (filed Nov. 24, 2003) (Cornaggia Opposition). Petitioners filed a reply on December 3, 2003. Reply to Opposition to Petition for Reconsideration (filed Dec. 3, 2003).

¹⁸ *Order on Reconsideration*, 18 FCC Rcd at 19282 ¶ 6.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Cornaggia Opposition at 1-2.

restrictions in effect at the time for the filing of applications.²² Specifically, during the relevant time period, the following restrictions were in effect:²³

Commencing April 20, 1988, applications for the Multichannel Multipoint Distribution Service (MMDS) E-channel and F-channel group frequencies, may be submitted for filing for any location which is farther than 50 miles from any proposed location of MMDS applications pending on April 19, 1988 or MMDS licensed facility locations. These locations must be farther than 15 miles from the boundary of a statistical area for which there are MMDS applications pending on April 19, 1988. Applications filed must comply with the location restrictions contained in this Notice . . . Applications that fail to comply with this requirement will be dismissed and unacceptable for filing.²⁴

Petitioners also assert that the interference analyses accompanying Cornaggia's application were incomplete, and in violation of Section 21.902 of the Commission's Rules thus rendering the Application as unacceptable for filing.²⁵

10. Based upon our further analysis, we agree with Petitioners that Cornaggia's application was defective because it did not comply with the terms of the *1988 Public Notice*. Although Cornaggia's application was filed after April 20, 1988, it proposed a facility that failed to comply with the location restrictions established by the *1988 Public Notice*. Specifically, the *1988 Public Notice* prohibited applications proposing transmitter sites located within 50 miles of existing licensed facilities.²⁶ Cornaggia's proposed site location was less than 50 miles, 39.56 km (24.58 miles), from the transmitter site of Station WHK999. Even though the Division granted Cornaggia's alternative request that her modification application, as amended by the petition for reconsideration, be treated as a newly-filed application,²⁷ Cornaggia's application was not exempted from compliance with the *1988 Public Notice*. Cornaggia did not request a waiver of the restrictions contained in the *1988 Public Notice*. The *1988 Public Notice* stated, "We do not anticipate granting any waivers of this location requirement."²⁸ Accordingly, Cornaggia's application was defective for failing to comply with the location restrictions established in the *1988 Public Notice*. We therefore grant the Petition and dismiss Cornaggia's application.²⁹

²² Petition at 3-4.

²³ Common Carrier Bureau Opens Filing Period for Multichannel Multipoint Distribution Service Applications, *Public Notice*, 3 FCC Rcd 2661 (CCB 1988) (*1988 Public Notice*).

²⁴ See *1988 Public Notice*.

²⁵ Petition at 1-2.

²⁶ *1988 Public Notice*.

²⁷ *CCB Reconsideration Order*.

²⁸ *1988 Public Notice*.

²⁹ In opposing the Petition, Cornaggia did not directly respond to Petitioners' arguments concerning the *1988 Public Notice*. Instead, Cornaggia argued that Petitioners' arguments must be rejected as inconsistent with the staff's independent engineering analysis. Cornaggia Opposition at 2-3. In fact, the staff's prior analysis looked at the application's compliance with the interference rules but did not study compliance with the location restrictions contained in the *1988 Public Notice*.

IV. CONCLUSION AND ORDERING CLAUSES

11. We conclude that Cornaggia's application must be dismissed for failure to comply with the location restrictions contained in the *1988 Public Notice*. We therefore grant the Petition.

12. Accordingly, **IT IS ORDERED** that pursuant to Section 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 405 and Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, the Petition for Reconsideration filed on October 27, 2003 by Alda Wireless Holdings, Inc. and PCTV Gold, Inc. **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, that the licensing staff of the Broadband Division **SHALL DISMISS** File No. 8950059 consistent with the Commission's Rules and this *Order on Further Reconsideration*.

14. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

John J. Schauble
Deputy Chief, Broadband Division
Wireless Telecommunications Bureau